

FORUMS FOR PUNISHING OFFENSES AGAINST THE LAW OF NATIONS

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Judge Everett and Mr. Silliman introduce the Statute of the International Tribunal, which has been established by the United Nations Security Council to prosecute violations of the law of war in the territory of the former Yugoslavia. The authors outline historical precedent for the International Tribunal and propose alternative military forums for punishing offenses against the law of nations. In particular, the authors discuss whether American courts-martial and military commissions are realistic alternatives to a specially constituted international tribunal when trying such offenses. After a brief comparison of these two American military tribunals, the article concludes that both are viable alternative forums to the International Tribunal.

INTRODUCTION

On May 25, 1993, the United Nations Security Council approved a resolution expressing "grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina."¹ The resolution also established an international tribunal to prosecute violations of international law "committed in the territory of the former Yugoslavia between 1 January, 1991, and a date to be determined by the Security Council."² This resolution closely followed a report by the United Nations Secretary-General in which he recommended that just such a tribunal be established to prosecute per-

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1. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. ¶¶ 1-2, U.N. Doc. S/25626 (1993), reprinted in 32 I.L.M. 1203, 1204 (1993).

2. *Id.*

sons responsible for war crimes in that war-ravaged area.³ Acting under Chapter VII of the United Nations Charter,⁴ the Security Council approved the Secretary General's report, including an Annex containing the Statute of the International Tribunal.⁵ This statute sets forth the Tribunal's jurisdiction over persons and offenses, its organizational framework, basic procedural and substantive rights of an accused, provisions for review and appeal, and miscellaneous administrative matters.⁶

This International Tribunal is to consist of eleven independent judges, no two of whom shall be from the same country.⁷ These eleven judges are to comprise a five-judge appellate chamber and two three-judge trial chambers.⁸ These judges are empowered to "adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters."⁹

The purpose of this article is to explore a potential alternative forum to the International Tribunal for trying and punishing offenses against the law of nations. Part I briefly surveys the clear historical precedent for this new international tribunal on war crimes. Part II then discusses the potential utility of the Uniform Code of Military Justice in prosecuting crimes against the law of nations. In particular, the article addresses whether American military tribunals are a realistic alternative to a specially constituted tribunal when trying such offenses. For example, could an American military commander deployed with his forces to another country in a peacekeeping or peace enforcement operation prosecute a Saddam Hussein or a General Aidid? The answer is that he can, and there is historical precedent for the use of military commissions or other military tribunals for this purpose.

3. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc S/25704 (1993), reprinted in 32 I.L.M. 1159 (1993) [hereinafter *Secretary-General's Report*].

4. Chapter VII of the United Nations Charter sets forth guidelines for appropriate U.N. action with respect to threats to the peace, breaches of the peace, and acts of aggression. U.N. CHARTER arts. 39-51.

5. S.C. Res. 827, *supra* note 1, ¶ 2, reprinted in 32 I.L.M. at 1204.

6. The Statute of the International Tribunal is set forth in the *Secretary-General's Report*, *supra* note 3, Annex, reprinted in 32 I.L.M. at 1192-1201.

7. Statute of the International Tribunal, art. 11, *Secretary-General's Report*, *supra* note 3, Annex, reprinted in 32 I.L.M. at 1178.

8. Statute of the International Tribunal, art. 12, *Secretary-General's Report*, *supra* note 3, Annex, reprinted in 32 I.L.M. at 1195.

9. Statute of the International Tribunal, art. 15, *Secretary-General's Report*, *supra* note 3, Annex, reprinted in 32 I.L.M. at 1181. Several months ago, the Department of Defense General Counsel sent a proposal for a United States draft of the proposed rules to the Legal Adviser for the Department of State. According to the DoD General Counsel, the draft would "strike a balance between protection of the accused's rights and the need to punish those responsible for the heinous crimes perpetrated in the former Yugoslavia." Letter from Jamie Gorelik, DoD General Counsel, to Conrad K. Harper, Legal Adviser, Department of State (Nov. 16, 1993) (on file with author). These proposed rules were officially submitted to the Tribunal at the Hague for its consideration shortly after they were received at the Department of State.

I. HISTORICAL PRECEDENTS FOR THE INTERNATIONAL TRIBUNAL

In the London Charter of August 8, 1945, the victorious nations of World War II agreed to establish an international military tribunal for the trial and punishment of major war criminals of the European Axis.¹⁰ This agreement was the genesis of the Nuremberg trials which, on October 1, 1946, convicted nineteen of twenty-four defendants and sentenced twelve of them to be hanged.¹¹ A similar international military tribunal was convened in Tokyo for the purpose of trying and punishing war criminals in the Far East.¹² Both commissions were *ad hoc*; both were predicated upon the right of the victors to try the vanquished.

Criticism of these tribunals, however, led to an article common to each of the four Geneva Conventions which requires each signatory to "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention."¹³ Arguably, the United States has satisfied that requirement, at least in part, through enactment of the Uniform Code of Military Justice in 1950.¹⁴ Articles 18 and 21 of the Code refer to the use of general courts-martial as well as military commissions for the trial of offenses against the law of war.¹⁵

II. THE AVAILABLE FORUMS

Article I, section 8, clause 14 of the United States Constitution gives Congress the power to "make Rules for the Government and Regulation of the land and naval Forces."¹⁶ However, this provision generally concerns the court-martial of American servicemembers for misconduct, rather than the trial of foreign nationals by American military or civilian tribunals.¹⁷ Thus, it would be applicable chiefly as a basis for statutes

10. Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government for the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.

11. International Military Tribunal (Nuremberg), Judgment and Sentences (Oct 1, 1946), *reprinted in* 41 AM. J. INT'L L. 172, 331-33 n.13 (1947).

12. See generally ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987).

13. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 3146, 4 Bivens 853; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 6 U.S.T. 3217, 3250, 4 Bivens 853; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 3418, 4 Bivens 853; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 3616, 4 Bivens 853.

14. 10 U.S.C. §§ 801-940 (1988).

15. 10 U.S.C. §§ 818, 821 (1988). These Articles were preceded by similar Articles in the former Articles of War. Compare 10 U.S.C. §§ 1471-1593 (1941) with 10 U.S.C.A. §§ 801-946 (West 1994).

16. U.S. CONST. art. I, § 8, cl. 14.

17. Congress made such "Rules" through the Uniform Code of Military Justice. In

designed to prosecute servicemembers for acts which might violate international law.

This constitutional provision might also serve as the predicate for statutes expanding the jurisdiction of federal district courts to fill the jurisdictional gap that now exists with respect to crimes—including violations of the law of war—committed by servicemembers subsequently discharged from the armed services,¹⁸ or by civilians accompanying the armed forces overseas.¹⁹ Indeed, curative legislation to this effect has been proposed from time to time.²⁰

Although the power of Congress under Article I, section 8, clause 14 extends only to servicemembers, its power under Article I, section 8, clause 10 is not restricted in a like manner. This latter clause grants Con-

Article 36 of the Code, Congress authorized the President to establish pre-trial, trial and post-trial procedures, including modes of proof, for cases arising under the Code. 10 U.S.C. § 836 (1988). In Article 56, Congress further authorized him to prescribe maximum punishments for offenses under the Code. 10 U.S.C. § 856 (1988). The President accomplished both through Executive Order in the Manual for Courts-Martial. Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (1984).

18. For example, in *Toth v. Quarles*, 350 U.S. 11 (1955), an ex-serviceman was arrested after discharge from the United States Air Force and taken to Korea for trial by court-martial on charges of murder and conspiracy to commit murder allegedly committed in Korea during his term of enlistment. The Supreme Court, in a six-to-three decision, with Justice Black writing for the majority, held that the military could not constitutionally subject ex-servicemembers like Toth to court-martial under Article 3(a) of the Uniform Code of Military Justice, 10 U.S.C. § 803(a) (1988 & Supp. IV 1992). *Id.* at 23. To allow courts-martial of discharged servicemembers would, in the eyes of the majority, encroach upon the jurisdiction of the federal district courts, where persons on trial are guaranteed more constitutional safeguards than those present in military tribunals. *Id.* at 14.

19. See *Reid v. Covert*, 354 U.S. 1 (1957). *Reid* involved the issue of court-martial jurisdiction over two civilian dependents of armed services personnel overseas who killed their respective spouses. Article 2(a)(11) of the Uniform Code of Military Justice, 10 U.S.C. § 802(a)(11), purported to extend court-martial jurisdiction to "persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." 10 U.S.C. § 802(a)(11) (1988) (emphasis added). The Supreme Court, in a rehearing of a case which was decided but one year earlier and which reached a contrary result (*Kinsella v. Krueger*, 351 U.S. 470 (1956)), with Justice Black now writing the lead opinion, held that Article 2(a)(11) could not be constitutionally applied to authorize the trial of civilian dependents of members of the armed forces overseas, in time of peace, for capital offenses. *Reid*, 354 U.S. at 35.

The Supreme Court later extended this rule to non-capital offenses. In *Kinsella v. Singleton*, 361 U.S. 234 (1960), the Court held that a court-martial conviction of a soldier's wife for involuntary manslaughter of one of her children in Germany was not constitutionally permissible. A similar decision with regard to civilian employees was handed down the same day in *McElroy v. Guagliardo*, 361 U.S. 281 (1960), where Justice Clark, writing for the majority, held that court-martial jurisdiction could not constitutionally extend to civilian employees of overseas military forces for noncapital offenses. *McElroy*, 361 U.S. at 284.

20. For a discussion of such legislation during the 1970's, see Robinson O. Everett & Laurent R. Hourcle, *Crime Without Punishment—Ex-Servicemen, Civilian Employees and Dependents*, 13 A.F. L. Rev. 184, 200-01 (1971). It has been reported that Senator Inouye of Hawaii has recently introduced legislation with some provisions of this type (S.129,103d Cong., 1st sess. (1993)); and Senator Ervin of North Carolina introduced bills to this effect in the 1960's.

gress the power "to define and punish . . . offenses against the Law of Nations."²¹ Thus, in a sense, international law is incorporated into domestic law.²² The nationality of an alleged offender is apparently irrelevant under this constitutional grant of authority, and federal district courts could presumably be empowered to hear cases involving "offenses against the Law of Nations." In fact, recent congressional action to make terrorism at home and abroad punishable in federal district courts may be an exercise of this power.²³

In addition to the federal district courts, Congress could properly use military commissions or other military tribunals for the same purpose.²⁴ Precedent for the use of American military tribunals to try foreign nationals can be found in *Ex parte Quirin*.²⁵ In *Quirin*, the Supreme Court upheld the jurisdiction of a military commission sitting in Washington, D.C. to try several saboteurs who had landed on the Atlantic Coast from a submarine.²⁶ The Court reasoned that under the Articles of War, the

21. U.S. CONST. art. I, § 8, cl. 10 (emphasis added).

22. That the law of nations constitutes a part of the laws of the land must be admitted. The laws of nations are expressly made laws of the land by the Constitution, when it says that "Congress shall have the power to define and punish piracies and felonies committed on the high seas, and offenses against the laws of nations." From the very face of the Constitution then, it is evident that the laws of nations do constitute part of the laws of the land.

11 Op. Att'y Gen. 299 (1865) (quoting U.S. CONST. art. I, § 8 cl. 10).

23. See, e.g., Aircraft Sabotage Act of 1984, Pub. L. No. 98-473, 98 Stat. 26 (codified as amended in scattered sections of 18 U.S.C. and 49 U.S.C.); Act for the Prevention and Punishment of the Crime of Hostage-Taking, 18 U.S.C.A. § 1203 (West Supp. 1994).

24. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Supreme Court noted that [t]he jurisdiction of military authorities, during and following hostilities, to punish those guilty of offenses against the laws of war is long-established. This court has characterized as "well-established" the "power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war." And we have held in the *Quirin* and *Yamashita* cases . . . that the military commission is a lawful tribunal to adjudge enemy offenses against the laws of war.

Id. at 786 (emphasis added) (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 312-14 (1945); citing *Ex parte Quirin*, 317 U.S. 1 (1942) and *In re Yamashita*, 327 U.S. 1 (1946)). See also generally A. Wigfall Green, *The Military Commission*, 42 AM. J. INT'L L. 832 (1948).

25. 317 U.S. 1 (1942).

26. *Id.* at 24. The eight accused saboteurs had all been born in Germany, lived in the United States, but then returned to Germany between 1933 and 1941. *Id.* at 20. After the declaration of war between the United States and the Third Reich, they were trained in explosives and other sabotage techniques near Berlin and then transported by German submarines to two different sites on the east coast, one at Amagansett Beach on Long Island, New York, and the other at Ponte Vedra Beach in Florida. *Id.* The four who landed at Amagansett Beach on June 13, 1942, carried explosives, fuses and incendiary and timing devices. *Id.* Immediately after landing, they buried the German Marine Infantry uniforms they had been wearing and proceeded in civilian dress to New York City. *Id.* The four who landed at Ponte Vedra Beach four days later similarly buried the German Marine Infantry caps (the only part of the uniform they had been wearing) as well as their supply of explosives, fuses, incendiary and timing devices. *Id.* These four then travelled in civilian dress to Jacksonville, Florida, and thence to various parts of the United States. All eight were later

predecessor to the Uniform Code of Military Justice, Congress had empowered either general courts-martial or military commissions to try violations of the law of war, such as espionage or sabotage.²⁷ Apparently, it made no difference that the accused claimed to be an American citizen.²⁸

In another significant case resulting from the Allied victory in World War II, the Supreme Court ruled that the Articles of War granted jurisdiction both to general courts-martial and to military commissions to try, as a violation of the law of war, General Yamashita's alleged failure to prevent the mistreatment of Filipinos by his troops.²⁹ This principle of imposing liability on a military commander for nonfeasance was apparently not relied on by the judges at Nuremberg where malfeasance was instead established. The law of war was further utilized by the Court to sustain the jurisdiction of military government tribunals established in the American-occupied portion of West Germany, even when the defend-

taken into custody, either in New York or Chicago, by agents of the Federal Bureau of Investigation. *Id.*

27. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.

Ex parte Quirin, 317 U.S. 1, 27 (1942).

28. One of the saboteurs in *Quirin*, Herbert Hans Haupt, came to the United States with his parents when he was five years old and claimed that he became a citizen by virtue of the naturalization of his parents during his minority. He argued that he had never lost his citizenship acquired in this manner. The Government, in turn, contended that Haupt had elected to maintain German allegiance and citizenship upon reaching his majority or that, in any case, he had renounced and abandoned his American citizenship through his actions as a saboteur. The court found it unnecessary to resolve the issue. *Id.* at 19.

29. *In re Yamashita*, 327 U.S. 1, 12-13 (1946). General Tomoyuki Yamashita was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands from October 9, 1944, until September 3, 1945, when he surrendered to and became a prisoner of war of the United States Army Forces in Baguio, Philippine Islands. He was charged with a violation of the law of war and tried by military commission in October of 1945. *Id.* at 5, 13. The Charge read:

Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the law of war.

Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 22-23 (1973). There were 123 separate atrocities alleged within the charge and, after hearing 286 witnesses, the Commission, none of whose members were lawyers, found Yamashita guilty of the charge and sentenced him to be hanged, the execution being carried out on February 23, 1946. *Id.* at 24-25, 36-37.

ants were civilians.³⁰

In enacting the Uniform Code of Military Justice in 1950,³¹ Congress reaffirmed its previous grant of authority to military tribunals to try violations of the law of war. Article 18 of the Code, which defines the jurisdiction of general courts-martial, provides that: "[g]eneral courts-martial also have jurisdiction to try any person who *by the law of war* is subject to trial by a military tribunal and *may adjudge any punishment permitted by the law of war*."³² Similarly, Article 21 states that the provisions of the Code which confer "jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or *by the law of war* may be tried by military commissions, provost courts, or other military tribunals."³³

Both Articles 18 and 21 of the Uniform Code are derived from parallel provisions of the former Articles of War³⁴ that were applied in *Ex parte Quirin*.³⁵ Presumably, these articles would be interpreted in accordance with the previous Articles of War and thus may be seen as conferring upon the President and various military commanders the authority to try transgressors of the law of war. Moreover, the President, as Commander-in-Chief, might have this authority even without such legislation.³⁶

30. *Madsen v. Kinsella*, 343 U.S. 341 (1952). Yvette J. Madsen, a native-born citizen of the United States, accompanied her husband, a lieutenant in the United States Air Force, to the American Zone in Occupied Germany where she resided with him incident to his assignment to Germany. *Id.* at 343. On October 20, 1949, Ms. Madsen was arrested at her residence at Buchschleg, Kreis Frankfurt, by the United States Air Force military police, for shooting and fatally wounding her husband. *Id.* at 343-44. She was charged with murder in violation of section 211 of the German Criminal Code, and brought for trial before the United States Court of the Allied High Commission for Germany. *Id.* at 344. She was found guilty by this court and sentenced to 15 years, to be served at the Federal Reformatory for Women in Alderson, West Germany. *Id.* at 344-45. From there she sought a writ of habeas corpus in order to contest the commission's jurisdiction over her. In affirming the commission's jurisdiction over Madsen, the Supreme Court held that

[i]n the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States. His authority to do this sometimes survives cessation of hostilities.

Id. at 348.

31. 10 U.S.C. §§ 801-940 (1988).

32. 10 U.S.C. § 818 (1988) (emphasis added).

33. 10 U.S.C. § 821 (1988) (emphasis added).

34. The language of Article 15 from the Articles of War is essentially identical to Article 21 of the current Uniform Code of Military Justice. Compare 10 U.S.C. § 1486 (1934) with 10 U.S.C. § 821 (1988).

35. 317 U.S. 1 (1942). For a discussion of *Ex parte Quirin*, see *supra* note 27 and accompanying text.

36. For example, in *Swaim v. United States*, 165 U.S. 553, 556-57 (1897), the Court stated that "[a]s Commander-in-chief, the President is authorized to give orders to his subordinates, and the convening of a court-martial is simply the giving of an order to certain

There are also two less explicit references to the law of war in the Uniform Code of Military Justice. Article 104 asserts that "any person" who aids the enemy or gives to the enemy intelligence "shall suffer death or such other punishment as a court-martial or *military commission* may direct."³⁷ Article 106 of the Code, which concerns spies, states:

Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a *military commission* and on conviction *shall* be punished by death.³⁸

By specifying either the general court-martial or military commission as an appropriate forum for trying and punishing offenders of the two crimes delineated in Articles 104 and 106 of the Code (aiding the enemy and spying), Congress seemingly does not intend to preclude the use of military commissions to try other violations of the law of war. Certainly, neither *Quirin* nor *Yamashita* points towards any such restrictive interpretation.³⁹ The decision whether a general court-martial or military commission is to be used for such trials will probably be made by a military commander.⁴⁰

If trial is to be by a general court-martial, the Military Rules of Evidence, which mirror the Federal Rules of Evidence and are set out in the Manual for Courts-Martial,⁴¹ would probably apply. The same rules of evidence would not apply, however, to the trial of a foreign offender by a military commission.⁴² Similarly, while a provision of the Geneva Conven-

officers to assemble as a court" (citing *Runkle v. United States*, 19 Ct. Cl. 396, 409 (1884)).

37. 10 U.S.C. § 904 (1988) (emphasis added).

38. 10 U.S.C. § 906 (1988) (emphasis added).

39. For a discussion of *Quirin*, see *supra* note 27 and accompanying text. For a discussion of *Yamashita*, see *supra* note 29 and accompanying text.

40. Article 22 of the Uniform Code of Military Justice specifies those officials who are authorized to convene general courts-martial. Such officials include, among others, the commanding officer of a unified or specified combatant command; the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps; the commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States; the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps; any other commanding officer designated by the Secretary concerned; or any other commanding officer in any of the armed forces when empowered by the President. 10 U.S.C. § 822(a)(1)-(7) (1988).

41. Exec. Order No. 12,473, 49 Fed. Reg. 17, 152 (1984).

42. *In re Yamashita*, 327 U.S. 1 (1946). In *Yamashita*, the Supreme Court addressed the issue of whether the Japanese General was entitled to the safeguards embodied in the Articles of War at his trial before the military commission. The Court was especially concerned with the admissibility of evidence and use of depositions in capital cases set forth respectively in Articles 25 and 38 of the Articles of War. *Id.* at 20. The Court noted:

By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission

tion states that a prisoner of war may be sentenced only by the same courts and according to the same procedure that would apply to persons belonging to the armed forces of the detaining powers, this provision applies only to crimes committed while a prisoner of war, and not for a violation of the law of war committed while a combatant.⁴³ Finally, although the system of appellate review prescribed for the court-martial of a servicemember would also apply to a general court-martial of a foreign national for crimes against the law of war, it would *not* apply in a similar prosecution before a military commission. Rather, Congress is free to authorize a different appellate process, which would be subject to only very limited review in the federal courts.⁴⁴

Johnson v. Eisentrager can be interpreted to mean that Article III courts would not review by writ of habeas corpus the trials of aliens by American military tribunals sitting overseas so long as the trial, deten-

contemplated by the common law of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not, apply in such trials. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class. Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.

Id.

43. *Id.* The Supreme Court also noted in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that

[t]he other claim is that they were denied trial "by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power," required by Article 63 of the Convention. It may be noted that no prejudicial disparity is pointed out as between the Commission that tried prisoners and those that would try an offending soldier of the American forces of like rank. By a parity of reasoning with that in the foregoing decisions, this Article also refers to those, and only those, proceedings for disciplinary offenses during captivity. Neither applies to a trial for war crimes.

Id. at 790.

44. In *Yamashita*, the Court clearly emphasized that

it must be recognized throughout that military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the case of the restraint of liberty."

Yamashita, 327 U.S. at 8 (citations omitted).

tion, and punishment have all taken place overseas. Likewise, such persons could not take advantage of the exclusionary rule derived from the Fourth Amendment.⁴⁵ Whether the Fifth or Sixth Amendments would apply is debatable. Furthermore, if the alien is seized overseas by American forces for alleged violations of the law of war and brought to the United States for trial in a civil or military tribunal, he would be unable to contest jurisdiction, absent some heretofore unprecedented provision in an extradition treaty between the United States and the country where the seizure occurred.⁴⁶ Clearly, American servicemen may be tried by general courts-martial if they violate the law of war.⁴⁷ However, because trial by a military commission would deprive a serviceman of the procedural protections afforded by the Uniform Code of Military Justice and by the Manual for Courts-Martial, it is uncertain whether servicemen might be tried by military commissions as aliens are.⁴⁸ If taken literally, however,

45. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). The Government obtained an arrest warrant for Rene Martin Verdugo-Urquidez, a Mexican citizen and resident believed to be a leader of an organization that smuggled narcotics into the United States. The arrest was made after Mexican authorities had apprehended him in Mexico and transported him into this country. *Id.* at 262. Following his arrest, DEA agents, working with Mexican officials, searched his Mexican residences and seized certain documents. *Id.* At trial, the district court judge granted the defense motion to suppress the evidence, holding that the Fourth Amendment applied to the searches of the defendant's residences and that the DEA agents had failed to justify searching without a warrant. *Id.* at 263. The Court of Appeals affirmed, but the Supreme Court reversed, holding that the Fourth Amendment reference to "the people" did not apply to a class of persons who are not a part of the national community nor to those who have not otherwise developed sufficient connection with the United States to be considered part of the community. *Id.* at 265-66. In effect, the Fourth Amendment was intended to protect people of the United States against arbitrary action by their own government, rather than to restrain actions of the federal government against aliens outside of the United States territory. *Id.* at 266.

46. See *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992). In *Alvarez-Machain*, the respondent was a Mexican doctor accused of using his medical skills in 1985 to keep an American DEA agent, Enrique Camarena Salazar, alive so that he could be tortured and interrogated. *Id.* at 2190. The respondent was forcibly kidnapped from his home by Mexican authorities at the request of DEA agents and flown by private plane to Texas, where he was arrested for his participation in the murder of DEA agent Salazar and his pilot. *Id.* The district court dismissed the indictment on the ground that it violated the Extradition Treaty between the United States and Mexico, and the court of appeals affirmed. *Id.* The Supreme Court, in a highly controversial opinion, reversed and applied the *Ker-Frisbe* doctrine in holding that the Constitution does not prohibit governmental action of this nature and that whether the extradition treaty was violated is a question best left to the political branches of government for resolution. *Id.* at 2191-92.

47. 10 U.S.C. § 818 (1988).

48. Article 21 of the Uniform Code of Military Justice, states that

[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821 (1988). The Manual for Courts-Martial is an Executive Order through which the President exercises the authority vested in him by Congress in Articles 36 and 56 of the Code. Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (1984).

the language of Articles 104 and 106 would authorize such trials for violations of these articles; and the rationale of *Madsen v. Kinsella* might suggest that a military commission could try a servicemember for any violation of the law of war.⁴⁹

CONCLUSION

Very little attention has been paid in recent years to the possibility of using American military tribunals to enforce the law of war. Such a use, however, appears to be a permissible option supported by precedent. Additionally, such a tribunal may sometimes be even more feasible than using international tribunals such as the one now established at the Hague for the trial of war crimes in the former Yugoslavia. The United Nations could authorize coalition forces to use military commissions incident to performance of their peacekeeping or humanitarian missions. Likewise, by exercising its power under Article I, section 8, clause 10 of the Constitution, Congress might direct that general courts-martial or military commissions be convened to try alleged crimes under the law of war. In any event, a statute or resolution establishing an International Tribunal to try war crimes should state specifically whether the jurisdiction of that Tribunal will be exclusive; will have priority over national courts, civil or military; or will be concurrent with the jurisdiction of national courts.⁵⁰

49. For a discussion of *Madsen v. Kinsella*, 343 U.S. 241 (1952), see *supra* note 30.

50. Article 9 of the current Statute of the International Tribunal for war crimes in the former Yugoslavia declares that, although the Tribunal and national courts shall have concurrent jurisdiction to prosecute offenders, the Tribunal shall "have primacy over national courts" and that "at any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal." *Secretary-General's Report*, *supra* note 3, reprinted in 32 I.L.M. at 1195.

